IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3191 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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VINAY EXTRACTION PVT LIMITED

Versus

VIJAY KHANNA

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Appearance:

1. Special Civil Application No. 3191 of 1996

MR TUSHAR P HEMANI for Petitioner

MR MANISH R BHATT for Respondent

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CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 24/06/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

What is challenged in this petition under Article 226 of the Constitution is the order dated 21.11.1995

(Annexure "A") passed by the Commissioner of Income-tax, Rajkot rejecting the petitioner's application for condonation of delay in filing the revision petitions under Section 264 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") on the ground that the petitioner had not shown sufficient cause for condonation of the delay.

2. The relevant AYs are 1982-83, 1983-84 and 1984-85. For the said years, the petitioner filed its returns of income claiming depreciation on the assets acquired by it. The claim was granted. However, the Assessing Officer rectified those orders under Section 154 of the Act and passed two separate rectification orders dated 5.9.1986 for AYs 1982-83 and 1983-84. Similarly, the Assessing Officer passed rectification order dated 11.12.1986 for AY 1984-85. The rectification orders were passed for reducing the amount of depreciation granted by reducing the cost of the assets in the hands of the petitioner by the amount of subsidy which was obtained by the petitioner. The petitioner did not challenge the aforesaid orders dated 5th September/11th December, 1986 either in appeal or revision or by filing any application under Section 154 of the Act. However, on 19.4.1995 the petitioner filed three separate revision petitions for the above assessment years contending that in view of the judgment of the Hon'ble Supreme in CIT vs. PJ Chemicals Ltd., 121 CTR 291 (210 ITR 830), the Government subsidy is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as a percentage of such cost and that the subsidy does not partake of the character of a payment intended either directly or indirectly to meet the actual cost of the assets. According to the petitioner, the facts of the case fell within the four corners of the decision and, therefore, the petitioner was entitled to depreciation on the written down value of the plant and machinery without deducting subsidy therefrom. The ground pleaded by the petitioner for condonation of delay read as under :-

> "As the above referred decision was not available at the time of passing of the order under Section 154, revision petition could not be filed at that time. We request you to condone the delay in filing this application and consider our case on its merits."

By the impugned order dated 21.11.1995, the Commissioner of Income-tax, Rajkot, the respondent herein, refused to condone the delay in filing the three

petitions and dismissed the petitions on the ground that the time limit set out in Section 264 of the Act for filing a revision petition is one year and the period of limitation begins to run from the date of service of the assessment order. The delay in filing the revision petitions was considerable and had remained unexplained.

It is this order which is under challenge in this petition.

3. At the hearing of the petition, Mr Tushar P Hemani, learned counsel for the petitioner has made the following submissions :-

(i) Subsequent decision of the Hon'ble Supreme Court is sufficient and reasonable ground for condonation of delay in filing the revision petition under Section 264 of the Act and it has been so held by this Court in Karamchand Premchand, (1975) 101 ITR 46.

(ii) Under the scheme of the Act, there are provisions permitting initiation of proceedings within as many as ten years and, therefore, the delay of 9 years in filing the revision petitions was not unreasonable.

(iii) In the matter of condonation of delay, the Court should adopt a liberal and lenient approach and to prefer the cause of substantial justice over technical considerations. No appeal was filed against the orders passed by the Assessing Officer under Section 154 of the Act in the year 1986 because of sheer inadvertence. However, that should not come in the way of condonation of delay in filing the revision petition when the order under Section 154 was patently erroneous and without jurisdiction as the same is against the law laid down by the Apex Court and also by this Court.

4. Mr Manish Bhatt, learned standing counsel for the revenue has opposed the petition and submitted that after the rectification orders were passed by the Assessing Officer in the year 1986, several High Courts had made pronouncements on the controversy in question between 1987 and 1992 and in fact this Court, being the jurisdictional High Court, had also held in CIT vs. Grace Paper Industries Ltd., (1990) 183 ITR 591 that general subsidy granted for giving incentives to the industrialists for establishing industries in backward

area was not to be reduced from the cost of acquisition of the assets. The decision was rendered and reported in the year 1990. Even after the said decision, the petitioner had not filed any appeal, revision or rectification application and thus, the petitioner had abandoned his right to challenge the rectification orders made in the year 1986. The petitioner having abandoned his right to challenge those orders, the petitioner cannot be permitted to wake up several years after the judgement of the Gujarat High Court and to challenge the rectification orders passed in the year 1986 by filing revision petitions in the year 1995. It is submitted that there has to be some finality in assessment proceedings and the matters cannot be allowed to be reopened after passage of so many years. Reliance is placed on the decisions in 167 ITR 289, 1997(5) SCC 536, 132 ITR 139 laying down that the question whether there was sufficient cause for condonation of delay is a question of fact and that the Court would not ordinarily interfere with the findings of the Commissioner under sub-section (3) of Section 264 of the Act on such issues.

5. Section 264 of the Act, in so far as is relevant for the purposes of the present petition, reads as under:-

"Revision of other orders.

264. (1) In the case of any order other than an order to which section 263 applies passed by an authority subordinate to him, the Commissioner may, either of his own motion or on an application by the assessee for revision, call for the record of any proceeding under this Act in which any such order has been passed and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit.

(2) The Commissioner shall not of his own motion revise any order under this section if the order has been made more than one year previously.

(3) In the case of an application for revision under this section by the assessee, the application must be made within one year from the date on which the order in question was communicated to him or the date on which he otherwise came to know of it, whichever is

earlier :

Provided that the Commissioner may, if he is satisfied that the assessee was prevented by sufficient cause from making the application within that period, admit an application made after the expiry of that period."

Contention (i) :-

6. It is true that the Apex Court has held that the Court should adopt a liberal approach in considering the application for condonation of delay and that substantial justice deserves to be preferred over technical considerations.

However, it is equally well settled that a person invoking the decision of the appellate or revisional authority beyond the prescribed period of limitation is required to show sufficient cause which would include showing that the petitioner/appellant was either bona fide pursuing his remedies or was prevented by sufficient cause from pursuing his remedies. Whether sufficient cause is made out or not is always a question of fact depending upon the facts and circumstances of each case and has to be established on record. An application seeking condonation of delay has also to establish that there was no negligence or inaction or want of bona fides and that the right granted under law to challenge the order was not abandoned. It cannot be overlooked that on expiry of the period of limitation prescribed for seeking legal remedy, a corresponding right accrues in favour of the other party and the same should not be lightly interfered with.

7. Coming to the facts of the present case, there is nothing on record to show that after the rectification orders were passed in the year 1986, the petitioner ever made any grievance or made any attempt to seek any relief before any forum for as many as 8 years. In para 2.3 of the petition, the petitioner has stated as under :-

"2.3 The said issue (the question of reducing the cost of acquisition of assets by the amount of subsidy) was subject matter of controversy at the relevant time as is evident from the fact that even there was conflict of view between different High Courts on this issue. Under the circumstances the petitioner did not take any action on the rectification orders passed by the Assessing Officer."

Between 1987 and 1992, except the Punjab & Haryana High Court, several other High Courts including this Court as also Allahabad, Bombay, Calcutta, Gauhati, Kerala, Orissa, Madras and Rajasthan High Courts had taken the view in favour of the assessee that where Government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost paid as subsidy is not a payment to meet any portion of the actual cost and, therefore, the subsidy is not required to be deducted from actual cost under Section 43(1) for the purposes of depreciation, etc.. In fact, on March 9, 1990, this Court also took the aforesaid view in CIT vs. Grace Paper Industries Pvt. Ltd., (1990) 183 ITR 591. The petitioner has not offered any explanation as to why the petitioner did not move any revision application or rectification application after the pronouncement of this Court being the jurisdictional High Court.

8. Of course, the submission made by the learned counsel for the petitioner is that because the matter was at large before the Hon'ble Supreme Court, the petitioner was entitled to wait till the Hon'ble Supreme Court finally pronounced on the controversy. Strong reliance is placed by the petitioner in this behalf on the decision of this Court in Karamchand Premchand Pvt. Ltd. vs. CIT, (1975) 101 ITR 46. In that case, for each of the assessment years 1961-62 to 1963-64, the assessee-petitioner had incurred expenditure on account of stamp duty, registration charges, etc. in connection with the issue of debentures secured on all the fixed assets of the petitioner. The Bombay High Court and certain other High Courts had held such expenditure as capital expenditure. Hence, the petitioner did not specifically claim deduction of such expenditure from its gross income in the respective years. In 1966, the Supreme Court reversed the above view and held that such expenditure must be treated as revenue expenditure. On coming to know of the said decision, the petitioner moved the Commissioner of Income-tax by revision petition under Section 264 of the 1961 Act and the corresponding provisions under the 1922 Act which also provided for a period of limitation of one year from the date of the assessment with power granted to the Commissioner to condone the delay for sufficient case. The petitioner requested for condonation of delay on the ground that the decision of the Supreme Court had changed the whole law on the subject and, therefore, there was sufficient cause for condonation of delay. The Commissioner refused to

condone the delay and dismissed the revision application as time barred. The petitioner thereupon approached this Court. Allowing the petition, this Court held that the decision of the Supreme Court amounted to a declaration of law as contemplated by Article 141 of the Constitution and this declaration had retrospective effect and rendered the assessment of the expenditure in question as capital expenditure. Apparent illegality crept into the assessment and became quite apparent only because of the decision of the Supreme Court. It was, therefore, only after the decision of the Supreme Court that the petitioner had reason to move the Commissioner in revision. The learned counsel for the petitioner has referred to the aforesaid observations of this Court and submitted that the pronouncement of the Supreme Court furnishes a ground for condonation of delay, even if it is after several years.

9. The decision in Karamchand Premchand's case is, however, required to be read in light of the facts of that case and the reasons given by this Court for holding that the petitioner had shown sufficient cause for condonation of delay. As per the settled legal position, the Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Judgments of Courts are not to be read as Euclid's theorems nor the observations therein as provisions of a statute. The observations in a judgment must be read in the context in which they appear. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not decisive.

10. In the case of Karamchand Premchand (Supra), the assessment orders were passed for the respective years between February 1963 and March 1964. The decision of the Supreme Court was rendered within two years thereafter. Hence, the delay in filing revision applications was of just about one year. Secondly, when the petitioner in that case had filed returns and the assessment orders were made for the relevant years, the jurisdictional High Court i.e. the Bombay High Court and certain other High Courts had held such expenditure to be capital expenditure and this Court observed - "it was

obviously because the real legal position appeared to be settled (against the assessee) that the petitioner did not keep the question "alive". Therefore, for the purpose of decision whether the petitioner had sufficient cause for not preferring the revision application in time, the fact that it did not keep the question alive by preferring appeals, which were likely to prove infructuous, did not make any difference."

11. On the other hand, in the instant case, as already indicated earlier, apart from the decision of several other High Courts, this Court, being jurisdictional High Court, had already held in the case of Grace Paper Industries rendered in March, 1990 and reported in the same year that general subsidy granted for giving incentives to the industrialists for establishing industries in backward area was not to be reduced from the cost of acquisition of the assets. Not a whisper is made by the assessee either in his application before the Commissioner of Income-tax or in the memo of the petition before this Court or even at the hearing of the petition as to why no attempt was made by the petitioner to seek any relief at that point of time. In fact, even after the decision of this Court in Grace Paper Industries' case rendered in 1990, the petitioner did not take any steps whatsoever for more than 4 years. In this set of circumstances, the decision in Karamchand Premchand's case is of no avail to the petitioner.

12. In Saurashtra Cement & Chemical Industries Ltd. vs. CIT, (1978) 115 ITR 27, the Commissioner of Income-tax refused to condone the delay in filing revision application although the petitioner had explained that during the intervening period the petitioner was pursuing his remedies of appeal before the Appellate Assistant Commissioner and thereafter before the Income-tax Appellate Tribunal. This Court followed the decisions of the Apex Court in Dinabandhu Sahu vs. Jadumoni Mangaraj, AIR 1954 SC 411 and Ramlal vs. Rewa Coalfields Ltd., AIR 1962 SC 361. This Court held that the words 'sufficient cause' (in Section 5 of the Limitation Act) should receive "a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant". This Court further held that while considering such an application what is to be seen is whether negligence or inaction or want of bona fides is imputable to the party concerned and whether substantial justice would be advanced by condoning the delay and again in exercising the judicial discretion in condoning the delay, this discretion like the other judicial

discretions must be exercised with vigilance and circumspection according to justice, common sense and sound judgment.

Admittedly, the petitioner had not shown any action or vigilance for a period of 8 years after the rectification orders were passed by the Assessing Officer way back in the year 1986.

13. As regards the decision in Nand Kishore vs. State of Punjab, (1995) 6 SCC 614 on which strong reliance has been placed by the learned counsel for the petitioner to contend that even the delay of 32 years has been condoned, a bare perusal of the said decision also clearly indicates that the appellant therein had not abandoned his right and was in fact pursuing his remedies. The appellant's writ petition challenging the order of compulsory retirement was dismissed by the High Court in February 1962. When the Apex Court pronounced its judgment in Moti Ram Deka vs. GM., NE Frontier Railway, AIR 1964 SC 600, the appellant filed a suit in February, 1964 within the period of limitation period of 3 years. When that suit ultimately culminated into a Special Leave Petition before the Apex Court, the appellant was advised by the three Judge Bench of the Apex Court to file a Special Leave Petition against the High Court order dated 5.2.1962 and thereupon the appellant filed a Special Leave Petition in the year 1990 for challenging the High Court order dated 5.2.1962. What is of utmost relevance is the fact that between 1964 and 1990 the appellant before the Apex Court had never abandoned his right because the appellant had been agitating the issue in the civil suit which culminated into the Special Leave Petition before the Apex Court. Under the circumstances, the decision of the Apex Court in Nand Kishore (Supra) cannot advance the petitioner's case any further, when the petitioner had not taken any action or shown any vigilance for a period of more than 8 years after the Assessing Officer passed the rectification orders in the year 1986.

14. As regards the decision of the Apex Court in CIT vs. Sunil J Kinariwala, (2003) 259 ITR 10, the decision is on merits of the controversy and the order of the Apex Court condoning the delay is not produced before us.

15. As regards the decision of the Bombay High Court in Bharatiya Engg. Corp. Pvt. Ltd. vs. RC Deshpande, (1981) 130 ITR 442, that was a case where after the Assessing Officer had passed an adverse order, the Chartered Accountant to whom the order was sent was

unwell and he had not attended to his work for a long time. After the assessee came to know about this fact, the assessee filed a revision petition beyond the period of limitation and the Court held that the assessee had sufficient cause for condonation of delay.

In the facts of the present case, the petitioner has not pleaded any inaction or negligence on the part of a third party, much less has he pleaded any action or vigilance on his own part. The decision is, therefore, clearly not applicable to the case at hand.

Contention (ii) :-

16. As regards the argument that under the scheme of the Act there are provisions permitting the revenue to make search or to reopen assessments within 10 years (now reduced to 6 years), it is not for this Court to sit in appeal over the wisdom of the Legislature in providing different periods of limitation for institution/initiation or completion of different proceedings. Even so, it is required to be noted that the power to reopen assessment beyond the period of four years is conferred only in cases where the assessee is shown to have suppressed material facts or has not made true and full disclosure of the facts relevant for assessment of income or income has escaped assessment on such culpable ground attributable to the assessee. The petitioner did have four years to move the Assessing Officer for rectification of the mistake under Section 154 of the Act and if at all such an application made within four years on the basis of the decision of the jurisdictional High Court had been rejected, the petitioner would have got one more year to move the Commissioner in revision under Section 264 of the Act or the petitioner could have filed an appeal against such order under Section 154 of the Act. It is, therefore, evident that the petitioner had such a long period for approaching the appropriate authorities for redressal of his grievance, if any. The petitioner not having availed of any such remedies for more than 8 years, and not showing any action having been taken by the petitioner or vigilance shown, it has to be held that the petitioner had abandoned his right to challenge the rectification orders passed way back in the year 1986 and the petitioner did not show sufficient cause for condonation of delay of more than 8 years in filing the revision petitions.

Contention (iii) :-

17. As regards the contention urged on behalf of the assessee that if this petition is dismissed, technical considerations will prevail over substantial justice, proceeds on the assumption that the so-called injustice to the appellant is not only proved on the basis of the record already available with the Assessing Officer at the time of rectification, but also that the injustice is apparent and gross. In this connection, we would like to again refer to the decision of this Court in Grace Paper Industries' case (183 ITR 591) which has been approved by the Hon'ble Supreme Court in CIT vs. PJ Chemicals Ltd., (1994) 210 ITR 830. Neither this Court nor the Supreme Court has held that subsidy per se cannot be deducted from the cost of acquisition of assets. The concerned Government scheme under which the subsidy was given has to be examined. In Grace Paper case and PJ Chemicals case, it was held that when the subsidy is given to attract the entrepreneurs to set up industries in backward areas and to achieve balanced growth of industries in different regions, some standard or measure may be adopted for granting such subsidy and, therefore, the cost of the fixed assets may be adopted as the basis for grant of subsidy. But there may be other kinds of subsidy which have a direct nexus with meeting a portion of the actual cost of any specific capital assets and, therefore, it would be a question of fact or atleast a mixed question of law and fact in each case whether the subsidy in question was a general subsidy for attracting industries in backward areas or whether it was a specific subsidy to meet with a portion of the actual cost of any specific capital assets. The petitioner had not produced any material to show that the subsidy availed of by the petitioner at the relevant time was a general subsidy as discussed earlier. Hence, it cannot be assumed at the out-set that what the petitioner had received was general subsidy and on that basis one should jump to the conclusion that the orders passed by the Assessing Officer in the year 1986 were so illegal, arbitrary and perverse so as to treat them as orders causing gross and manifest injustice warranting either interference by the Commissioner in exercise of his powers under sub-section (3) of Section 264 of the Act for condoning the delay of 9 years or to warrant interference of this Court in exercise of its extraordinary, prerogative and discretionary writ jurisdiction under Article 226 of the Constitution.

In the above view of the matter, it is not possible to accept the petitioner's contention without

any factual scrutiny that the subsidy availed of by the petitioner at the relevant time was general subsidy and it was not a specific subsidy. It is, therefore, not possible to hold that the principle laid down by the Hon'ble Supreme Court in the case of Collector, Land Acquisition vs. Katiji, (1987) 167 ITR 471 is applicable to the facts of the instant case.

18. We do not find merit in any of the contentions urged on behalf of the petitioner. The petition is, therefore, dismissed.

Rule is discharged with no order as to costs.

(M.S. Shah, J.)

(D.A. Mehta, J.)

sundar/-